IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1427 OF 2007

Haji N. Abdulla, Indian Inhabitant, having his address at C/o. M/s. Thowfeeq Fisheries, N.H.17, Navunda, Kundapura Disrict, Udupi Taluka-576 224 and also at C/o. Umesh Naik IIS Inditi Ashirvad Building, Building No.5, Rama Mandir Road, Gala No.140, Goregaon (West), Mumbai. ..Petitioner.

V/s.

1. Income Tax Settlement Commission, Additional Bench, having its Mahalaxmi Chambers, Mahalaxmi, Mumbai - 400 034.

2. The Commissioner of Income-tax, Karnataka (Central), having his office at Central Revenues Building, Queen;'s Road, Bangalore - 560 001.

3. The Asstt. Commissioner of Income-Tax, Central Circle, Income Tax Office, Mangalore.

4. Union of India, Ministry of Finance, Govt. of India, Aayakar Bhavan, 2nd Floor, Maharshi Karve Road, Mumbai - 400 020. ..Respondents.

Mr.K.B.Bhujle with G.S.Pikale i/b. M/s.S.V.Pikale & Co. for petitioner.

Mr.B.M.Chatterji with Mrs.P.P.Bhosale and Mr. P.S.Sahadevan for respondents.

CORAM : F.I.REBELLO AND
J.P.DEVADHAR, JJ.

DATED : 8TH OCTOBER, 2007.

ORAL JUDGMENT (PER F.I.REBELLO, J.)

Rule. Heard forthwith.

2. The petitioner an individual has filed his returns of income for the assessment year 1995-96 to 2000-01 with the Income Tax Officer, Ward 2, Udupi. The petitioner also filed regular returns of income for the assessment year 2001-02 and 2002-03 with the Assistant Commissioner of Income Tax (Central) Circle, Mangalore. The petitioner also filed block return for assessment years 1991-92 to 2001-02 for the block period 1/4/1990 to 27/2/2001 disclosing undisclosed income of Rs.22,22,351/-. On 27/2/2001 search operation under section 132 of the I.T. Act had been carried out on the business and residential premises of the petitioner. On 27/2/2003 the block assessment order was passed determining the undisclosed income at Rs.82,68,217/-. The petitioner has preferred an appeal before the Commissioner of Income Tax (A) against the block assessment order which is pending.

3. The petitioner on 29/10/2003 filed an application under section 245C(1) before the Settlement Commission offering Rs.10 lakhs as additional income. By its order on 26/7/2004 the Settlement Commission

rejected the application on two grounds (1) At the time of filing the application under section 245C(1) there was no valid pendency of any proceeding as the entire adjudication tax was not paid in the pending appeal; (2) there is no full and true disclosure as the Settlement Commission did not agree that the quantum of undisclosed income declared is justified.

Misc. Application was taken out for rectification of this order on 17/9/2004. The same was dismissed by the order of the Settlement Commission on 28/6/2005.

4. The petitioner then filed a fresh application under section 245C(1) as according to the petitioner there was a valid proceeding pending. The petitioner in the application offered Rs.15 lakhs instead of Rs.10 lakhs as offered in the earlier application.

According to the petitioner the Settlement Commission was satisfied as regards pendency of proceedings, however, rejected the application by an order dated 31/10/2006 on the ground that making of full and true disclosure is a one time activity. The petitioner filed Misc. Application for rectification of order dated 31/10/2006. The same was dismissed by a

speaking order dated 15/2/2007. Aggrieved, the petitioner has preferred the present writ petition.

5. In a case where an application is moved under section 245C, the Settlement Commission under section 245D has to call a report from the Commissioner. The further exercise of jurisdiction is dependent on:-

1) the material as contained in the report of the Commissioner;

2) having regard to the nature and circumstances of the case;

3) complexities of the investigation involved therein;

4) the Settlement Commission then, shall by an order either reject the application or allow the application to proceed with in circumstances set out therein.

. It is the case of the petitioner that when the first application was rejected as not maintainable, no proceedings were pending, as in the appeal filed, the entire self assessment tax was not paid, at the

time of making that application. It is submitted, therefore, that the appeal as filed was not properly constituted. The Settlement Commission thereafter was right in dismissing the first application on the ground that there was no proceedings pending. As far as the second ground of no full and true disclosure, it is submitted that once an application was dismissed on the ground that no proceedings were pending, the Settlement Commission's subsequent finding that there was no full and true disclosure is without jurisdiction and consequently will have to be ignored. It was, therefore, open to the Settlement Commission to entertain the second application. The second application submitted was dismissed on the ground that in its earlier order dated 31/10/2006 the Commission had decided that full and true disclosure was not made. Learned counsel submits that this finding disclosed an error of law apparent on the face of record and consequently, is liable to be set aside.

6. On behalf of the respondent, it is firstly submitted that the petitioner's income has been assessed under section 44AE of the I.T. Act and, therefore, there is no scope for the petitioner to say that there are complexities. The petition does not disclose as to what are the complexities of the accounts. The appeal preferred for the block

assessment year of 27/2/2003 is still pending. It is also set out that the C.I.T.(C) Bangalore has given a report under section 245D(1) in May, 2004 to the effect that this is not a complex case that requires consideration of a higher forum like the Settlement Commission. The assessee, it is submitted, has not brought out any issue so complex that the CIT (A) cannot determine it. Determining the ownership of lorry or income from lorry are not complex issue which the C.I.T. (A) cannot determine or requires the higher forum of Settlement Commission for determination. It is next submitted that the petitioner had offered to disclose additional income of Rs.15 lakhs including Rs.10 lakhs offered in the original application. This would show that the assessee had not made a full and true disclosure in the first application. The application becomes a case wherein multiple disclosure is made.

7. At the hearing of this petition, we had asked the learned counsel as to how a fresh application would be maintainable before the Settlement Commission which is a quasi judicial authority without setting aside the first order of the Commission. Learned counsel submitted that the first application was dismissed on the ground that no proceedings were pending and consequently, the other reason given that

there was no full and true disclosure was without jurisdiction. The first order, it is submitted is a nullity at law and consequently the second application was maintainable.

8. In the instant case, it is not the case of the petitioner that the Settlement Commission did not have jurisdiction to entertain the application. The submission is that the Settlement Commission though a forum of competent jurisdiction failed to exercise jurisdiction on the ground that there was no pending proceedings. This, it is submitted, will result in holding that the order is a nullity at law and can be so declared in subsequent proceedings and even in collateral proceedings.

9. We may first examine the power of appeal which is conferred under section 249. One of the requirement is that the appeal shall be presented within 30 days. There is no dispute that the appeal was not so presented. Even if the appeal was presented beyond the period prescribed, power has been conferred upon the Commissioner (A) on showing sufficient cause to admit the appeal. The other requirement is that no appeal shall be admitted unless at the time of filing the appeal, where the returns has been filed by the assessee, the assessee had paid the tax due on income

returned by him, or when no return has been filed by the assessee, the assessee has paid an amount equal to the amount of advance tax which was payable. The contention of the petitioner is that on the day the application was moved before the Settlement Commission and was disposed off, the tax dues were not paid. The bar under section 249(4) is that the appeal would not be admitted unless the tax dues are first paid. It is not the case of the petitioner that the appeal was dismissed for failure to pay the tax dues. On the contrary, according to the petitioner, the tax dues have subsequently been paid and the appeal is pending. Preferring an appeal and admission of an appeal are two distinct requirements. Presenting an appeal and admission are two different stages. A proceeding can be said to be pending even on presentation though it may not be admitted for the Tribunal to dispose of the appeal on merits. Can it, therefore, be said that the proceedings were not pending. This has to be considered in the context that we are called upon to exercise our extra ordinary jurisdiction in this case. This, therefore, is not a case of patent lack of jurisdiction. This is a case were an appeal was presented but was not admitted at the time when the Settlement proceedings were disposed of as tax dues had not been paid. The Settlement Commission may have recorded that the proceedings were not pending. That

by itself cannot be a ground to hold that the proceedings were not pending. At the highest, it would be a case where the appeal was not admitted. The Settlement Commission also declined to entertain the application on the ground that there was no full and true disclosure. The order of the Settlement Commission is an order of a quasi judicial authority. Once there be a order of a quasi judicial authority, remedy of a person aggrieved is to challenge that order before the competent forum. It would be open to a party to present a second application without the first order being set aside only in a case where an order can be said to be a nullity at law. In other words, where the Tribunal had no jurisdiction to assume jurisdiction. In our opinion, this is not a case of want of jurisdiction. It is a case of failure to exercise jurisdiction and when an order was passed by giving reasons, a second application before the Settlement Commission would not be available in the absence of a challenge to that order. There has to be a finality attained to an order passed by the Court or a quasi judicial authority. It is only in those rare cases where the order is a nullity at law and is patently demonstrable, that Court some times may treat the order as a nullity at law and non est and enquire into the matter. As order which is patently a nullity at law on the face of it, can be called in question

whereever and whenever it is sought to be relied upon.

10. We then proceed to the consequential issue that once an application was pending and the Settlement Commission had recorded a finding that there was no true disclosure it would then be a finding of fact and in a subsequent proceeding it would not be open to the Settlement Commission to review the said finding in the absence of any power to consider any fresh materials or cause of action. In the instant case, therefore, the finding of the Settlement Commission that considering the finding recorded in the first application, it would not be open to consider the second application, cannot be said to be without jurisdiction.

11. The alternative contention on the basis that the second application was maintainable, can now be considered. The Commission while recording its decision noted that the petitioner had filed an application and not made full and true disclosure and for that reason the first application was rejected. The second application was filed for the same period making incrementally higher disclosure. The Settlement Commission held that making full and true disclosure is an one time activity. There cannot be repeated or hopeful attempts at making full and true disclosure. Multiple disclosure militates against the very basis of

settlement, which involves true and full disclosure being made so as to warrant consideration. The Settlement Commission relied on the Judgment of this Court in the case of C.I.T. V/s. ITSC (Bom) & Ors. (246 I.T.R. 63) where this Court approvingly quoted the following observations:

> " There is no right in the assessee to invoke the Commission's jurisdiction even while he continues with his dishonest conduct. "

from the Judgment of the Madras High Court in the case of V.M.Shaikh Mohammed Rowthar (235 I.T.R. 581).

We may now consider the Judgment relied on behalf of the petitioner. Reference was made to the Judgment of the **Ajay Mahendrakumar Shah V/s. Commissioner of Income Tax** reported in **(1997) 92 Taxman 116 Gujarat**. On facts, the settlement application was rejected on the ground that there was no pendency of the proceedings. Subsequently, notice under section 148 was issued. A fresh application was made and that also was rejected. The petition was filed in the Gujarat High Court. From the observation in para 4 of the Judgment, it is clear that on account of peculiar facts relief was granted. There is no discussion on

the issue of maintainability of the second application. This Judgment is no authority for the proposition that when the first application is dismissed, a second application is maintainable.

12. It is next submitted that the petitioner in fact had made full and true disclosure. The Commission, it is submitted was bound to give reasons for its conclusion. The Commission has given no such reasons. Reliance is placed on the Judgment of the learned Bench of this Court in **Centurion Bank of Punjab Ltd. V/s. Income Tax Settlement Commission & Ors.** reported in **290 I.T.R. 555 (Bom.)**. In that case, the application before the Settlement Commission was dismissed on the ground that the case does not involve complexities and that there was no full and true disclosure by the petitioner. On the issue of full and true disclosure, it was contended that the petitioner had disclosed relevant facts in the case and based on the same the assessment had been completed. It was contended that the Tribunal has mainly observed that there is no full and true disclosure without setting out any particulars. The learned bench placed reliance on the Judgment of the Supreme Court in **Calcutta Discount Co. Ltd. V/s. ITO** reported in **41 I.T.R. 191 (S.C.)**. The Supreme Court in that case was examining the issue of full and true disclosure. The

Court held that once all the primary facts are before the assessing authority, it requires no further assistance by way of disclosure. This Court, on facts there held that completion of investigation were involved and that merely stating that there was no full and true disclosure would not be sufficient.

13. On our finding, there cannot be a fresh application in respect of the same subject matter, if the first application is rejected, after assuming jurisdiction, as the Settlement Commission is a quasi judicial authority. The petitioner in the first application had disclosed unescaped income of Rs.10 lakhs which the Settlement Commission in its order dated 26/7/2004 rejected. It appears from the order that no reasons were given accept for stating that the Commission does not agree with the petitioner that the quantum of the undisclosed income declared before them is justified. It is true that in the second order, the Commission relied on its first order. At the same time, the Commission did take note of the fact that the income disclosed in the second application is more than what was disclosed in the first application. Apart from that in the Misc. Application, the petitioner has raised the issue that no reasons had been given for holding that the quantum of undisclosed income was not correct. Contention was also raised that the

proceedings are pending. In respect of the first contention that was disposed of by holding that it would be appropriate to discuss what the appellate authority had discussed and hold that the exercise of discretion cannot be a matter of rectification in such a case. In respect of the second contention, it was held that as the appellant had not paid the entire amount payable, there was no admitted appeal and hence the proceedings were not pending. Learned counsel tried to explain the additional amount by contending that it arose from the same material and only the issue is, as to what income had escaped assessment. We are unable to agree with the same. A person who seeks to invoke the jurisdiction of the Commission must come and disclose the true facts. Nothing had happened between the first disclosure and the second disclosure warranting the petitioner to disclose a larger quantum. In our opinion, on this count also, the finding arrived at by the Commission does not not suffer from any error and consequently, the petition is liable to be dismissed.

14. In so far as the issue of complexities is concerned, that issue has not been argued before the Commission nor has Commission either in its first order or second order dealt with the same. In our opinion that question would not arise for our determination.

Consequently, petition is dismissed. Rule discharged. There shall be no order as to costs.

(F.I.REBELL0, J.)

(J.P.DEVADHAR, J.)